



COMMONWEALTH OF MASSACHUSETTS
Board of Registration
of
Hazardous Waste Site Cleanup
Professionals

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PROFESSIONAL CONDUCT COMMITTEE
Minutes of Meeting on June 5, 2008
[Approved on July 18, 2008]

Prepared by: Terry Wood

Meeting Location: Massachusetts Department of Environmental Protection, Central Regional Office, Worcester, MA.

- 1. Call to Order:** Debra Stake called the meeting to order at 12:35 p.m. Also present were Janine Commerford, Deborah Farnsworth, Christophe Henry, Robert Luhrs, Paul Mullen, Kelley Race, and Debra Phillips. Gail Batchelder joined the meeting at 12:45 p.m. Gretchen Latowsky joined the meeting at 1:16 p.m. Committee members absent: Kirk Franklin. Staff members present were Allan Fierce, Brian Quinlan, Lynn Read, Ron Viola, Terry Wood and Al Wyman. Also present was Wesley Stimpson, the LSP Association's Executive Director; Larry Feldman of the LSP Association; Dawn Waters; Mark Baldi and Mary Gardner of MassDEP; Karen and Paul Salamone. Marcia Berger joined the meeting at 12:45 p.m.
- 2. Announcements:** None.
- 3. Previous Minutes:** The draft minutes of the meeting held on March 27, 2008 were approved with minor edits.
- 4. Old Business**
 - A. Status of CRTS**

At Ms. Stake's request, the chair of each CRT reported on progress made since the March meeting.

B. Update re: Web Site Subcommittee

Ms. Commerford stated that the subcommittee has not met. Ms. Wood stated that, since the March meeting, she has added summaries of the cases that concluded with early agreements for discipline to the Web site after having received approval to do so from subcommittee members.

C. Update re: recommended decisions from DALA

Mr. Fierce stated that, since the last meeting, Committee members had received recommended decisions in two cases.

5. New Business**A. Review letters from LSP objecting to the posting of information regarding dismissed complaints on the LSP Board Web site**

Mr. Fierce stated that an LSP had sent two letters to the Board asking Board members to reconsider their decision to post dismissed complaints on the LSP Board Web site's disciplinary history pages. Mr. Stake stated that the Board had decided to post dismissed complaints on the Web site because the Board felt it was important to be consistent so that people looking at the Web site would receive the same information as a person who calls Board staff to ask how many complaints a particular LSP has received.

Mr. Fierce gave Committee members copies of e-mails he has received recently from other LSPs regarding this issue as well as a print-out of one LSP's disciplinary history page. Ms. Stake asked whether complaints that are dismissed by staff for lack of jurisdiction are included on the Web site. Ms. Wood said they are included.

After being asked to do so by Committee members, Ms. Wood explained the Board's current policy regarding phone inquiries about complaints. She stated that staff members inform callers about the number of complaints made against a particular LSP. That number includes both pending complaints and closed ones. She stated that callers are informed that the files regarding all closed complaints are public and anyone can request copies of documents or can choose to make an appointment to come in and review the files. As for pending complaints, callers are informed that a pending complaint exists but are also told that the case may be dismissed at the end of a Board investigation or may result in some level of discipline. She also stated that the only information given to callers regarding pending complaints is that they exist but they are given no other information such as complaint number, complainant, date the complaint was filed, etc.

Ms. Berger stated that she has come to the Board regarding this issue because she has had three dismissed complaints that show up on her disciplinary history page and all of them were the result of fee disputes with clients. She stated that the placement of these dismissed complaints on the Board's Web site has had a negative effect on her business and is especially hard on LSPs such as herself who own their own businesses. She stated that, over the course of the past year, she had received five calls from people who have found her name

on the LSP Board Web site's list of LSPs but ended up not getting work from any of these callers. She stated that, in the past, she always received the job as a result of this type of call. She believes the fact that the three dismissed complaints are listed on the Web site is the reason she did not get the work.

Mr. Feldman stated that he also has a dismissed complaint that involved a fee dispute on his Web disciplinary history page. He stated that a client mentioned having seen the dismissed complaint on the Web page and that, had he not already known Mr. Feldman, he may have chosen a different LSP as a result of the existence of the dismissed complaint.

Mr. Feldman also stated that people who call the LSP Board to ask about a particular LSP's disciplinary history could be told that they need to make a public records request for documents rather than giving out any information over the telephone.

Ms. Race stated that she too has a complaint that was dismissed for lack of jurisdiction listed on her Web disciplinary page. She stated that she had not provided professional services in regard to the site but a citizens group nevertheless chose to file a complaint against her. She stated that she thinks it is particularly unfair to have complaints that were dismissed for lack of jurisdiction listed on an LSP's disciplinary history page.

Mr. Fierce stated that he has done some research regarding how other Boards handle dismissed complaints. He stated that most Boards give out very limited or no information regarding dismissed complaints on their Web sites. He stated that his recommendation would be to only list cases that resulted in discipline against an LSP.

Ms. Wood stated that some dismissed complaints included both allegations that are outside the Board's jurisdiction (such as fee disputes or allegations regarding work that was not LSP professional services) but also included allegations that were within the Board's jurisdiction but, even if true, would not have risen to the level of Board discipline. She stated that it, therefore may be difficult to try to separate out complaints dismissed for lack of jurisdiction from other dismissed complaints. Ms. Wood also stated that, at the present time, Board staff assigns complaint numbers to all complaints filed with the Board but the Board could consider not assigning a number to a complaint until after a determination has been made that the allegations fall within the Board's jurisdiction.

After some discussion among Committee members, Ms. Commerford summarized the discussion as raising the following issues: 1) whether to list dismissed complaints on the LSP Board Web site's disciplinary history pages; 2) what Board staff should tell callers who call to ask about an LSP's complaint history; 3) whether to list pending complaints on the LSP Board Web site's disciplinary history pages; and 4) whether complaint numbers should continue to be assigned to complaints upon their receipt.

Mr. Feldman also noted that the Board might want to consider when immediate suspensions should be listed on an LSP's disciplinary history page. He suggested that the Board consider

only listing them once the Board has made a decision to uphold the immediate suspension after a hearing with the LSP.

A motion was made to remove dismissed complaints from the LSP Board Web site and to instruct Board staff to draft language for a footnote stating that one could call Board staff for additional information. The footnote would appear on each LSP's disciplinary Web page. Ms. Race recused herself from voting. The motion was seconded and passed with a vote of 9 (Batchelder, Commerford, Farnsworth, Henry, Latowsky, Luhrs, Mullen, Phillips, and Stake) to 0. Board staff will prepare draft language for a footnote to be reviewed at next month's meeting.

The Committee instructed Board staff to remove all dismissed cases from the Web site's disciplinary history pages and to leave pending complaints on the Web site for the time being. The Committee tabled further discussion of the remaining issues listed by Ms. Commerford.

The Committee took a break at 1:55 p.m. The Committee reconvened at 2:05 p.m.

B. Complainant's requests for (i) reconsideration of the Board's dismissal of case 05C-04, and (ii) the Board's consideration of additional allegations.

Debra Phillips, Robert Luhrs, Paul Mullen and Kelley Race are all recused from case 05C-04, so they all left the room before discussion began. The Board had dismissed disciplinary case 05C-04 after investigation on March 27, 2008. Case 05C-04 concerned whether a DPS Opinion filed by an LSP met MCP standards and the Board's rules of professional conduct.

Ms. Read handed out some site plans regarding the site at issue in case 05C-04 and noted that the complainants, who filed for reconsideration of the Board's dismissal of the case, were present. She stated that the Board staff separated out the information submitted by the complainants' into two parts: 1) a request for reconsideration of the dismissal of complaint 05C-04; and 2) new allegations against the LSP regarding other professional services the LSP performed at the site.

Ms. Read recommended that the Committee first consider the complainants' request for reconsideration. She stated that the Committee needed to decide whether to reconsider their decision to dismiss complaint 05C-04. She stated that, according to Board regulation, the standard for reconsideration is "for good cause shown." She stated that the members of the Complaint Review Team ("CRT") for 05C-04 and Mr. Wyman, the staff investigator for the case, had reviewed the reconsideration request and had an opinion if the Committee wanted to hear it.

The Committee members asked the members of the CRT and Mr. Wyman to explain their opinion regarding the reconsideration request. Ms. Read stated that the CRT and Mr. Wyman do not believe the request includes any new information that the CRT did not consider during its investigation of complaint 05C-04.

MS. Stake recognized the complainants who stated that they want to make sure that the site adjacent to their property is cleaned up appropriately so that they do not have to worry about continued litigation with the abutters. They stated that they do not believe that the LSP who was the subject of complaint 05C-04, who works for the adjacent property owners is doing a good job. The complainants also stated that they were disappointed that they were not given an opportunity to meet with the CRT during the investigation of complaint 05C-04.

Mr. Fierce stated that, because the subject of complaint 05C-04 was a DPS Opinion filed by the LSP, the CRT investigated only the DPS Opinion and not any work the LSP may have performed later on the site. He also stated that the CRT investigated whether the LSP's work in regard to the DPS Opinion met MCP standards and the Board's rules of professional conduct. The CRT did not form an opinion whether the LSP's conclusion that contamination was migrating onto the site from an upgradient property was correct.

A motion was made and seconded not to reconsider the Board's dismissal of complaint 05C-04.

Ms. Latowsky asked whether the old information could be considered if a new complaint was opened regarding more recent work by the LSP. Mr. Fierce stated that it could.

One of the complainants stated that she was not sure if the CRT had considered that the LSP had collected samples from a manhole that s/he did not send to a lab for analysis. Ms. Read stated that the CRT did know about the manhole samples and did not believe the LSP abused his/her discretion by not sending the samples to the lab.

Ms. Farnsworth asked whether the CRT considered the transcription errors in the DPS opinion that are described by the complainants in the request for reconsideration. Ms. Batchelder stated that the CRT had taken these errors into account and concluded that, even with the errors, the LSP's work in regard to the DPS Opinion did not warrant discipline.

A second motion was made and seconded not to reconsider the dismissal of complaint 05C-04. The motion passed unanimously.

Ms. Read discussed the new allegations included in the letter filed by the complainants. She stated that the new allegations concerned more recent work by the same LSP at the same site. She added that the LSP had submitted a response to the new allegations which was included in the packets for today's meeting. Ms. Read stated that she and Mr. Wyman had reviewed the new allegations and believe that all but possibly one of the new allegations, if true, would not rise to the level of warranting discipline.

Ms. Commerford stated that the Committee's options regarding the new allegations were: 1) to not accept them as a new complaint; 2) assign a CRT to investigate them as a new complaint; or 3) assign the allegations to a screening team who would come back to the Committee with a recommendation whether to assign a CRT to investigate.

A motion was made and seconded to appoint a screening team to review the allegations and make a recommendation to the Committee. The motion passed unanimously.

A second motion was made, and seconded, that the screening team should be the members of the CRT who investigated complaint 05C-04 because they are already familiar with the site. The motion passed unanimously. The members of the screening team will be Ms. Commerford, Ms. Batchelder and Ms. Read. The committee asked the members of the screening team to try to come back with a recommendation at next month's meeting.

C. Complaint 08C-02

This complaint was filed by MassDEP and alleged, among other things, that an LSP did not adequately demonstrate that a condition of 'no significant risk' had been achieved before filing a Response Action Outcome Statement for a site. A motion was made and seconded to appoint a CRT to investigate the complaint. The motion passed unanimously.

D. Complaint 08C-03

This complaint was filed by MassDEP and alleged, among other things, that an Immediate Response Action Completion Statement filed by an LSP did not adequately demonstrate that an Imminent Hazard condition had been eliminated or controlled. A motion was made and seconded to appoint a CRT to investigate the complaint. The motion passed unanimously.

6. Future Meetings

The Committee is next scheduled to meet on July 17, 2008 at Weston & Sampson in Peabody. The Committee is also scheduled to meet on August 21, 2008, at a location to be determined.

7. Adjournment: The meeting was adjourned at 3:29 p.m.